

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ZACK AARONSON, as an individual  
and on behalf of all others similarly  
situated,

CASE NO. 09-CV-1333 W (BGS)

Plaintiffs,

vs.

VITAL PHARMACEUTICALS, INC.,  
a Florida Corporation, dba VPX,

**ORDER (1) OVERRULING  
AARONSON'S OBJECTION  
[DOC. 28] TO DISCOVERY  
ORDER AND (2) GRANTING  
AARONSON'S EX PARTE  
APPLICATION [DOC. 44] FOR  
EXTENSION OF TIME TO  
COMPLETE DISCOVERY**

Defendant.

Pending before the Court is Plaintiff Zack Aaronson's objection to Magistrate Judge Bernard G. Skomal's June 17, 2010 discovery order, and ex parte application for an extension of time to complete discovery. Defendant Vital Pharmaceuticals, Inc. ("VPX") opposes.

The Court decides the matters on the papers submitted and without oral argument. See Civ.L.R. 7.1(d.1). For the reasons stated below, the Court **OVERRULES** the objection [Doc. 28] and **GRANTS** the ex parte application [Doc. 44].

1    I.    **BACKGROUND**

2    VPX manufactures dietary supplements and energy drinks under the brand name  
 3    “Redline.” (*Compl.* [Doc. 1], 2:5-6.) Plaintiff Zack Aaronson filed the present proposed  
 4    class action on June 16, 2009, alleging that VPX failed to adequately warn consumers  
 5    of the health risks associated with using Redline products. (*Id.*, 2:11-12.)

6       On May 3, 2010, Judge Skomal ordered the parties to conduct a case  
 7    management conference, exchange initial disclosures, and submit a discovery plan. (See  
 8    Doc. 20.) On May 7, 2010, VPX submitted a discovery plan. (See Doc. 21, at 1:19–20.)  
 9    After reviewing the document, Judge Skomal determined that the parties failed to  
 10   conduct a thorough Rule 26(f) conference. He, therefore, ordered the parties to  
 11   conduct a proper Rule 26(f) conference and submit a joint discovery plan focusing on  
 12   “issues pertinent to filing and opposing a motion for class certification.” (*Id.*, 1:24-2:6.)  
 13   Judge Skomal further ordered that if the plan was not submitted by May 19, 2010,  
 14   counsel would be required to hold the conference in chambers. (*Id.*)

15      On May 26, 2010, counsel appeared in Judge Skomal’s chambers to conduct the  
 16   Rule 26(f) conference, but they again were unable to agree on a discovery plan. (Doc.  
 17   23, 2:1–5.) Accordingly, Judge Skomal concluded that the “parties have a discovery  
 18   dispute and should proceed to file a Joint Motion for Determination of Discovery  
 19   Dispute in order for the Court to decide what discovery will be permitted for the limited  
 20   purpose of filing and opposing a class certification motion.” (Doc. 23, 2:6–9.) The  
 21   order further clarified the procedure the parties were to follow in identifying the  
 22   discovery sought:

23      The joint motion is to include . . . [a] joint statement (see sample format  
 24   attached) with the following:

- 25       i.     The exact category of documents or things requested to be  
                 produced or the exact matter for examination pursuant to Fed. R.  
                 Civ. P 30(b)(6);
- 26       ii.    The exact response to the request by the responding party;
- 27       iii.   A statement by the propounding party as to why the documents  
                 should be produced or why the deposition should be taken,

- 1                   including the legal basis for why the information is necessary to file  
 2                   or oppose a motion for class certification;  
 3                  iv. A precise statement by the responding party as to the basis for all  
 4                   objections and/or claims of privilege, including the legal basis for all  
 5                   privileges and objections.

6                   (Id., 2:9-15.)

7                   On June 9, 2010, the parties filed the joint motion. In his portion of the joint  
 8                   motion, Plaintiff objected to bifurcating discovery, and argued that Plaintiff should be  
 9                   allowed to conduct merits discovery. (Jt. Mt. [Doc. 24], 2:3–5:24.) Additionally,  
 10                  Plaintiff ignored the procedure set forth in the order for requesting discovery, and  
 11                  instead generally described the type of discovery Plaintiff needed. (Id., 6:16-11:5.)

12                  On June 17, 2010, Judge Skomal issued an order (the “Discovery Order”) denying  
 13                  without prejudice Plaintiff’s requests for discovery on the ground that he failed to follow  
 14                  the format ordered by the court. (*Discovery Order*, 2:17–19.) Additionally, Judge  
 15                  Skomal determined that the “case is unlikely to continue if not certified as a class  
 16                  action” and, therefore, stayed “all merits discovery unrelated to class certification” and  
 17                  “limited discovery [to] issues pertaining to Fed.R.Civ.P. 23.” (Id., 3:4–7.) The order  
 18                  further set October 1, 2010 as the deadline for filing a motion for class certification.  
 19                  (Id., 3:23.)

20                  On July 3, 2010, Plaintiff filed a notice of objection to the Discovery Order.  
 21                  Because the objection was not resolved by the deadline for filing the motion for class  
 22                  certification, Plaintiff subsequently also filed an ex parte application seeking to extend  
 23                  the discovery deadline.<sup>1</sup>

## 24                  II. STANDARD OF REVIEW

25                  A party may object to a non-dispositive pretrial order of a U.S. Magistrate Judge  
 26                  within ten days after service of the order. See FED. R. CIV. P. 72(a). The magistrate

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27                  <sup>1</sup>Because Plaintiff’s objection was filed as a notice, and not as a motion, the document  
 28                  was not identified on the Court’s motions report and, therefore, was not recognized as a motion  
 29                  until after Plaintiff filed the related ex parte application.

1 judge's order will be upheld unless it is "clearly erroneous or contrary to law." Id.; 28  
 2 U.S.C. § 636(b)(1)(A). The "clearly erroneous" standard applies to the magistrate  
 3 judge's factual determinations and discretionary decisions, including an order imposing  
 4 discovery sanctions. Maisonville v. F2 America, Inc., 902 F.2d 746, 748 (9th Cir. 1990)  
 5 (holding that factual determinations made in connection with a sanction award are  
 6 reviewable for clear error); Grimes v. City and County of San Francisco, 951 F.2d 236,  
 7 240 (9th Cir. 1991) (holding that discovery sanctions are non-dispositive pretrial  
 8 matters reviewable for clear error under Rule 72(a)). Under this standard, "the district  
 9 court can overturn the magistrate judge's ruling only if the district court is left with the  
 10 definite and firm conviction that a mistake has been made." Weeks v. Samsung heavy  
 11 Industries Co., Ltd., 126 F.3d 926, 943 (7th Cir. 1997).

12 On the other hand, the "contrary to law" standard permits independent review  
 13 of purely legal determinations by a magistrate judge. See, e.g., Haines v. Liggett Group,  
 14 Inc., 975 F.2d 81, 91 (3d Cir. 1992) ("the phrase 'contrary to law' indicates plenary  
 15 review as to matters of law."); 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER &  
 16 RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3069 at 350 & 355 (2d ed.  
 17 1997); Gandee v. Glaser, 785 F.Supp. 684, 686 (S.D. Ohio 1992), Aff'd 19 F.3d 1432  
 18 (6th Cir. 1994) ("Thus, [the district court] must exercise its independent judgment with  
 19 respect to a magistrate judge's legal conclusions.").

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21 **III. DISCUSSION**

22 **A. Plaintiff's Objection to the Discovery Order Lacks Merit.**

23 Plaintiff raises two objections to Judge Skomal's Discovery Order. Having  
 24 reviewed the parties' papers, as well as the Discovery Order, the Court finds Plaintiff's  
 25 objections lack merit.

26 Plaintiff first objects to the bifurcation of discovery. According to Plaintiff,  
 27 bifurcation will "significantly increase the cost of discovery," "close off avenues of  
 28 inquiry that might lead to information that will support Plaintiff's motion for class

1 certification," and prevent Plaintiff from identifying other possible class members. (Obj.,  
 2 2:7–12.) But Plaintiff has failed to support these claims with any detail. For example,  
 3 Plaintiff fails to provide any specifics regarding the amount of duplication that would  
 4 occur with bifurcation, contending only that some unidentified number of Florida  
 5 depositions will have to be taken twice. (Obj., 2:8–9.) In short, Plaintiff has failed to  
 6 persuade the Court that bifurcation would "significantly" increase costs or somehow  
 7 hinder Plaintiff's ability to seek discovery relevant to class certification.

8 Moreover, Plaintiff has failed to dispute Judge Skomal's finding that the case will  
 9 likely be dismissed if class certification is denied. Accordingly, the Court agrees with  
 10 Judge Skomal that bifurcation is warranted in this case. For these reasons, the Court  
 11 finds Plaintiff has failed to demonstrate that Judge Skomal's decision to bifurcate  
 12 discovery is contrary to law.

13 Plaintiff next objects to Judge Skomal's denial of Plaintiff's discovery requests.  
 14 There is no dispute, however, that Plaintiff ignored Judge Skomal's order that outlined  
 15 the format the parties were to use in requesting discovery, and instead simply listed  
 16 "general areas of discovery. . . ." (See *Objection*, 4:4-5.) Accordingly, the Court  
 17 concludes that Judge Skomal's denial of Plaintiff's discovery requests was not contrary  
 18 to law.

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20       **B. Plaintiff's Ex Parte Application is Granted.**

21 The Discovery Order required Plaintiff to file his motion for class certification on  
 22 or before October 1, 2010. However, Plaintiff's Objection was still pending on the  
 23 deadline to file the motion. Accordingly, the Court finds good cause to extend the  
 24 deadline to complete discovery pertaining to class-certification issues.

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26       **IV. CONCLUSION AND ORDER**

27 For the foregoing reasons, the Court **OVERRULES** Plaintiff Aaronson's  
 28 objection to the Discovery Order, **GRANTS** his ex parte application for an extension

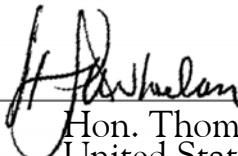
1 of time to complete class-certification discovery, and ORDERS Plaintiff's motion for  
2 class certification filed on or before May 16, 2011.<sup>2</sup>

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4 IT IS SO ORDERED.

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6 DATED: February 23, 2011



7 \_\_\_\_\_  
8 Hon. Thomas J. Whelan  
9 United States District Judge

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28 <sup>2</sup>The motion deadline has been set to approximate the amount of time Plaintiff had to complete class-certification discovery when he filed the objection to the Discovery Order.